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No. 90-84

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

EDUCATION ASSISTANCE CORPORATION,
a South Dakota corporation,
Petitioner,

vs.

LAURO F. CAVAZOS,
Secretary of Education of the United States,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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*THOMAS L. SHRINER, JR.
DAVID M. REICHER
RICHARD M. ESENBERG
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400

*Counsel of Record

Attorneys for Petitioner

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The Secretary's brief in opposition to EAC's petition for certiorari[1] takes the predictable tack of belittling the significance of the case. To this end, the Secretary makes a plainly incorrect statement of fact and uses two true statements to advance one illogical and one misleading argument against granting the writ. In the end, however, he proves the importance of the issues presented—and the worthiness of the case for certiorari—by making as bold a claim to unbridled power as the Government has advanced here in many years.

1. The Secretary's incorrect statement is that "[t]he questions presented in the petition are identical to the questions presented" in three other pending petitions from the Fourth Circuit. (Br. Opp. 10) A mere look at the petitions shows that the questions presented are not identical. They are, of course, related, for all the petitions arise from cases attacking the constitutionality of § 3001 of the Omnibus Budget Reconciliation Act of 1987. But the questions are different in several respects, for the underlying cases are different.

EAC, unlike the other petitioning guaranty agencies, insured no new loans after the effective date of the Budget Act, insisting on its rights under existing contracts even at the cost, if necessary, of withdrawing from the GSL Program.[2] Thus, this petition presents in its starkest form the issue whether the Government may constitutionally excuse itself from carrying out its existing contractual obligations.

2. The truth that the Secretary illogically uses is the unanimity of result reached so far by the courts of appeals

[1]The Rule 29.1 list on page ii of the petition remains accurate.

[2]EAC is also a private nonprofit corporation, rather than an agency of a state, as those other petitioners are. *See* Pet. n.13.

which have decided cases brought by guaranty agencies. The point is illogical because it does not tend to undercut the importance of the issues presented, the ground on which EAC seeks review of the Eighth Circuit's decision. It is, unfortunately, possible for several courts of appeals to get it wrong, particularly when the prevailing party is a government agency playing on the administrative and financial complexities of a program in which it is supposed to be expert. An inter-circuit conflict insures that one of the courts of appeals is wrong, but lack of conflict neither logically nor experientially guarantees correctness.

Moreover, all of the guaranty agency decisions in the courts of appeals are very recent. The principle of practically limitless authority to seize the property of regulated entities and to avoid government promises, subscribed to in those decisions, is certain to draw opposition from a court of appeals before long.

Already, in the context of attempts by the Government to repudiate commitments made to induce private investors to take over failing thrift institutions, the Government's attempt to read *Bowen v. Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986), as broadly as the Court of Appeals did here has met rebuff in two trial courts. *Far West Federal Bank, S.B. v. Director, Office of Thrift Supervision*, F. Supp. , No. CV 90-103-PA (D. Ore. Sept. 14, 1990), 1990 WESTLAW 131548; *Winstar Corp. v. United States*, 21 Cl. Ct. 112, No. 90-8C (July 27, 1990), 1990 WESTLAW 106247.

3. The fact which the Secretary uses misleadingly is the repeal of the challenged provision of the Budget Act. The September 30, 1989 sunset built into the Budget Act in § 3002 does not mean that the issue of the Government's power to seize the property of regulated private entities or to abro-

gate its contractual obligations will not recur. Indeed, as will be discussed next, the Government's success in the courts of appeals has already emboldened it to claim a power even broader than that which it articulated in the courts below, and such a claimed power, carrying with it the ability to avoid financial commitments, is bound to be exercised again.

It is true that EAC has little money left to expropriate on a second round of seizure. But that does not make "the questions presented . . . of only historical interest, and review by this Court . . . not warranted" [Br. Opp., Nos. 89-1873 *et al.* 13, incorporated by reference at Br. Opp. 10], any more than the issues in *Lynch v. United States*, 292 U.S. 571 (1934), would have been inappropriate for review just because Congress was unlikely to repudiate its obligation to pay service members' insurance a second time.

4. EAC's right to reimbursement from the Secretary of between 80% and 100% of the amounts it has paid out on its insurance of student loans is explicitly set forth in its Reinsurance and Supplemental Reinsurance Contracts with the Secretary. Congress has also expressly recognized that reimbursement at those rates is a "contractual right against the United States, during the life of such loan." 20 U.S.C. § 1078(c)(1)(A). Throughout this litigation and the other cases brought against the Secretary by guaranty agencies, the Secretary has been careful to affirm the inviolability of that contractual right and of his concomitant duty to pay, although he has claimed—EAC thinks disingenuously—that, without repudiating the right, payment could be conditioned on compliance with the seizure requirements of the Budget Act.

Obviously exulting in the plenitude of power accorded the Government by the courts of appeals' decisions in his favor, the Secretary now for the first time asserts:

> Petitioners' claim rests on the assumption that they had a contractual (and therefore a property) interest in a rate of reimbursement that could not be affected by subsequent legislation. That assumption, however, is mistaken.

(Br. Opp., Nos. 89-1873 *et al.* 17, incorporated by reference at Br. Opp. 10)[3] The authority asserted for this astounding proposition is the "subsequent changes" clauses in the contracts[4] and the expansive view of *Bowen* endorsed by the courts of appeals. *Id.* at 18.

Especially as applied to EAC, which has never issued a post-Budget Act new loan guaranty, this claim amounts to one that EAC—and, by extension, all "regulated" entities dealing with the Government and relying on its promises—has no rights which the Government is bound to respect. For this case presents no issue of Congress's power to change reimbursement rates prospectively, only whether it has the raw power to change the rules after the game has been played, to avoid paying what it has promised to pay *after* the other party to the contract has already performed by issuing

[3]Before his victory in the Court of Appeals, the Secretary was far more circumspect in his assertions. There he described as a reasonable financial expectation of EAC's investors that "the federal government would . . . *reimburse at least 80% of its eligible claims payments to lenders* . . . ." (Secretary's Eighth Circuit Br. 30, emphasis added) Moreover, he responded there to EAC's suggestion that under his argument Congress could amend the law to eliminate all reinsurance on previously guaranteed loans by saying: "EAC's hypothesis . . . is dead wrong." *Id.* at 44 n.22.

[4]EAC's treatment of the subsequent changes clauses [Pet. 18-21] is one of several arguments ignored by the Secretary in the course of adopting his argument in opposition to the petitions in Nos. 89-1873 *et al.* as his argument in this case. In an effort to persuade the Court that the petitions are all the same, the Secretary conveniently avoids having to respond to difficult arguments made by EAC alone.

its guaranty. The overreaching reflected in the Secretary's current claim reinforces the case for granting certiorari.

Dated this 28th day of September, 1990.

Respectfully submitted,

*THOMAS L. SHRINER, JR.
DAVID M. REICHER
RICHARD M. ESENBERG
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400

**Counsel of Record*

Attorneys for Petitioner